IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRY S. HARTMAN, Appellant, v. NATIONWIDE MUTUAL INSURANCE COMPANY, NATIONWIDE LIFE INSURANCE COMPANY, ASSURITY SECURITY GROUP, INC., ASSURITY LIFE INSURANCE COMPANY, Respondents.	)	DIVISION ONE No. 64966-3-I UNPUBLISHED OPINION FILED: May 17, 2010

Dwyer, C.J. — To prevail on a claim for violation of Washington's Consumer Protection Act (CPA), chapter 19.86 RCW, a plaintiff must establish that he or she suffered an injury as a result of an unfair or deceptive trade practice or act. A plaintiff may establish injury by demonstrating the loss of use of property. Such a showing requires that the plaintiff have an interest in the purportedly lost property. Although Terry S. Hartman's insurer, Assurity Life Insurance Company, mistakenly represented that Hartman's insurance policy provided disability benefits in an amount greater than it provided in actuality, Hartman was not entitled to the misrepresented benefits amount because the misrepresentation did not occur as part of the formation of his policy.

Accordingly, we affirm the trial court's summary judgment order of dismissal.

I

In 2000, at the urging and with the assistance of his then-spouse, Hartman applied for and obtained a "Guaranteed Renewable Disability Income Policy" from Nationwide Life Insurance Company. Pursuant to the terms of this policy, if Hartman became disabled, he would receive a maximum monthly payment of $5,000 in disability benefits for a period of up to five years.[1] Assurity subsequently reinsured and assumed responsibility for administering Hartman's disability policy.[2]

In September 2004, after the dissolution of his marriage, Hartman requested that Assurity cancel his policy. In his cancellation request, Hartman stated that he had been unaware of his policy's existence and that he could not afford to pay the policy premium.[3] Hartman did not inquire as to the amount of coverage under his policy or other policy terms, indicate that he required a certain amount of coverage, or indicate that he was considering obtaining a policy from a different insurer.

In response, Assurity temporarily suspended Hartman's account and

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[1] According to the benefits schedule in Hartman's policy and the application page bearing Hartman's signature, the policy would provide a maximum monthly payment of $3,800 in disability benefits and a maximum monthly payment of $1,200 as part of an "integrated social benefits rider," bringing the total maximum monthly benefits payment to $5,000.

[2] As this dispute arises out of the actions taken by one of Assurity's employees after Assurity had succeeded Nationwide as Hartman's insurer, we refer to all defendant-respondents collectively as Assurity.

[3] Hartman wrote the following cancellation request on his quarterly premium bill statement: "Close this Account immediately[.] I was never aware that my wife took this policy out for me[.] Cannot afford this policy[.] DO NOT WANT IT."

mailed to Hartman a "conservation letter" that misstated the maximum monthly benefits available under his policy as being $10,000. Linda Nettland, the Assurity employee who prepared the conservation letter, inadvertently miscalculated the amount of benefits available under Hartman's policy. According to Assurity, the purpose of the conservation letter was to advise Hartman of the consequences of cancelling his policy, including the inability to reinstate the policy's existing terms after cancellation.

After receiving the conservation letter, Hartman changed his mind about cancellation. Hartman returned the conservation letter to Assurity with a partial premium payment and a handwritten note in which he stated, "I see it would be a mistake to cancell [*sic*] this policy."[4] Hartman subsequently paid the outstanding premium balance, and the policy remained in force. In notifying Assurity that he desired to retain his policy, Hartman did not indicate that he had considered obtaining coverage from a different insurer, that he decided to retain his policy instead of obtaining a different policy or additional coverage, or that he required a minimum amount of coverage.

In November 2004, Hartman became disabled. He subsequently filed a claim with Assurity for disability benefits under his policy. Assurity accepted Hartman's claim and began paying him monthly disability benefits. However, instead of paying Hartman $10,000 per month, Assurity paid him only $5,000 per

[4] Hartman's note read, in full: "I see it would be a mistake to cancell [*sic*] this policy. Please rebill me again as I have misplaced balance due. Enclosed a check for $300."

month.

In August 2008, Hartman sued Assurity. His sole cause of action was that Assurity had violated the CPA by representing in the conservation letter that his disability benefits were greater than those actually available under his policy. For relief, Hartman sought unpaid and underpaid disability benefits, treble damages, and attorney fees.[5]

During discovery, Hartman was deposed. In his deposition, Hartman testified that, even though he had signed the insurance policy application containing the benefits schedule, he was not aware of his policy's specific terms when he obtained it but that he believed it provided a maximum disability benefit of $8,000 per month and that the benefits amount would periodically increase. In addition, Hartman testified that he had initially requested that the policy be cancelled because he could not afford to pay the premium but later changed his mind upon receiving the conservation letter. He testified that the only basis for his claim was that he was paid less than what he believed he was entitled to according to the conservation letter. Hartman did not testify that he had requested that Assurity issue a policy providing a minimum amount of coverage or amend his existing policy to provide $10,000 in monthly disability benefits. Nor did he testify that he had decided to forgo an opportunity to obtain a policy

[5] Pursuant to RCW 19.86.090, a person who is "injured in his or her business or property by a violation of" the CPA "may bring a civil action . . . to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award . . . may not exceed twenty-five thousand dollars."

with terms different from his existing Assurity policy or that he had even considered obtaining a different policy.

The parties subsequently filed cross-motions for summary judgment. The trial court granted Assurity's motion and entered an order dismissing Hartman's cause. Hartman appeals.

II

Assurity contends that Hartman has not made a prima facie showing that it violated the CPA because he has not demonstrated that he actually suffered an injury as a result of the misstatement in the conservation letter. We agree.

We review de novo a trial court's order granting summary judgment. Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009) (citing Biggers v. City of Bainbridge Island, 162 Wn.2d 683, 693, 169 P.3d 14 (2007)). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005). In determining whether a genuine issue of material fact exists, we view all facts and draw all reasonable inferences in favor of the nonmoving party. Owen, 153 Wn.2d at 787 (citing Ruff v. King County, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)).

The CPA prohibits entities and individuals engaged in trade or commerce from employing unfair or deceptive practices in the course of conducting business with consumers. See RCW 19.86.020.[6] As noted above, a person who has been injured in his or her business or property may bring a civil action for injunctive relief, actual damages sustained, and reasonable attorney fees and costs, and that person may seek treble the amount of actual damages up to $25,000. See RCW 19.86.090. To prevail on a CPA claim, "a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; [and] (5) causation." Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). "Failure to satisfy even one of the elements is fatal to a CPA claim." Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 298, 38 P.3d 1024 (2002) (citing Hangman Ridge, 105 Wn.2d at 793). In this context, we need address only the injury element.

The only injury that Hartman contends he has suffered is the loss of $5,000 per month in disability benefits, or, stated differently, the difference between the amount of monthly disability benefit payments he received from Assurity—$5,000 per month—and the amount of maximum monthly benefits as represented in the conservation letter—$10,000. A "[s]ufficient injury to satisfy

[6] The statute provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." RCW 19.86.020.

the fourth and fifth elements of a [CPA] claim is established when a plaintiff is deprived of the use of his property as a result of an unfair or deceptive act or practice." Sorrel, 110 Wn. App. at 298 (citing Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). "The injury element will be met if the consumer's property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violation are minimal." Mason, 114 Wn.2d at 854 (citing 1 H. Alperin & R. Chase, Consumer Law § 136, at 194 (1986)). Accordingly, the conveyance of title to real property from a consumer to a lender based on a deceptive purchase agreement has been recognized as a sufficient diminution of property interest to constitute injury under the CPA, see Mason, 114 Wn.2d at 854, as has the wrongful withholding of a prepayment for nursing home care and accrued interest to which a surviving spouse was entitled. See Sorrel, 110 Wn. App. at 298–99.

Contrary to Hartman's assertion, he did not lose the use of *his* property. The loss of use of property presupposes an interest in the property that a plaintiff claims to have been unable to enjoy. The plaintiffs in Mason and Sorrel suffered injury because they had relinquished their respective property rights pursuant to unfair or deceptive trade practices. Unlike those plaintiffs, Hartman did not similarly surrender a property interest entitling him to an additional $5,000 in monthly benefits.

For the proposition that he was injured by not receiving the amount of

benefits identified in the conservation letter, Hartman relies on Peterson v. Big Bend Insurance Agency, Inc., 150 Wn. App. 504, 202 P.3d 372 (2009), and Shah v. Allstate Insurance Co., 130 Wn. App. 74, 121 P.3d 1204 (2005). However, the situations presented in those cases are readily distinguishable from that presented in this case. In those cases, the plaintiffs' CPA claims arose out of errors and misrepresentations that occurred in the formation and procurement of insurance policies, resulting in the plaintiffs being underinsured compared to the amounts of coverage that they had requested and that their insurance agents had assured them they possessed. See Peterson, 150 Wn. App. at 510–13; Shah, 130 Wn. App. at 78–79. Those plaintiffs were injured because they did not receive the insurance benefits that they had requested at the time their policies were formed, despite receiving assurances from their respective agents that their policies would provide the requested coverage.

Hartman's cause does not arise out of a misrepresentation that occurred in the formation of an insurance contract. He does not claim that he requested disability coverage providing a maximum of $10,000 in monthly benefits or that Assurity, as part of the formation and procurement of his insurance policy, represented to him that he was covered for that amount. Hartman does not contend that Assurity's mailing of the conservation letter and his subsequent response and payment constituted an offer and an acceptance such that they formed a new contract or that those acts constituted novation of the existing

policy. Indeed, in his briefing, he affirmatively disavows bringing any contract claim. Yet, other than pointing to the misstatement in the conservation letter, Hartman does not explain why he is entitled to disability benefits in an amount exceeding that provided for in the insurance policy.

Nor is there any evidence or even a contention that Hartman decided to forgo an opportunity to procure a different disability policy or that he had even considered doing so, as was the case in Shah. See 130 Wn. App. at 79, 86. To the extent that Hartman lost the use of any of *his* property as a result of the conservation letter, he lost the premium payments that he made after deciding to retain his disability policy. However, Hartman does not claim that those payments constitute injury.[7]

Hartman's claimed injury of unpaid and underpaid disability benefits amounts to a claim to monies that he had no right to receive. As such, he has failed to establish that he has suffered an injury. As Hartman has not established that he actually suffered an injury, he has "no remedy under the CPA." Ledcor Indus. (USA) v. Mut. of Enumclaw Ins. Co., 150 Wn. App. 1, 13, 206 P.3d 1255 (citing RCW 19.86.090), review denied, 167 Wn.2d 1007 (2009). The trial court properly entered a summary judgment of dismissal.

Affirmed.

[7] We note that were Hartman to claim that he was injured by continuing to pay his premium based on the conservation letter and to seek damages in the form of a return of those premium payments, Assurity would likely be able to seek recovery of the benefits it has paid to Hartman under his disability policy—a scenario Hartman understandably seeks to avoid.

Dwyer, C.J.

We concur:

Schindler, J. Appelwick, J.